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SUPREME COURT OF APPEALS OF VIRGINIA.

SCOTT ROLLER MILL CO., INC., v. SOWDER *et al.*

Sept. 14, 1911.

[72 S. E. 108.]

1. Assignments for Benefit of Creditors (§ 340*)—Property Conveyed—Claim of Third Party—Evidence.—In a controversy where assignees for the benefit of creditors filed a bill asking the aid of the court in their administration of the estate, a claimant, made a party defendant, asserted title to a part of the estate claimed by the assignees on the ground that the deed of conveyance to them did not include the property involved. Held, that claimant had failed to establish his claim.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 1025-1035; Dec. Dig. § 340.*]

Appeal from Circuit Court, Floyd County.

Bill by V. M. Sowder and others, as trustees of Winfield Scott for the benefit of his creditors, asking the aid of the circuit court of Floyd county in the administration of the trust, in which the Scott Roller Mill Company, Incorporated, a claimant, was made a party defendant. From a decree of the circuit court, the Scott Roller Mill Company appeals. Affirmed.

Scott, Buchanan & Cardwell and *B. G. Howard*, for appellant.

C. B. & H. M. Moomaw and *R. F. Tompkins*, for appellees.

HARRISON, J. On the 15th day of April, 1908, Winfield Scott conveyed to V. M. Sowder, G. W. Agnew, and F. J. Agnew, trustees, all of his estate, real and personal, for the benefit of all of his creditors; the appellant company being named in the deed of assignment as one of the creditors thereby secured. The bill in this case was filed by the three trustees named in the deed, seeking the aid of the court in the administration of the trust imposed upon them.

The present controversy is over the balance of a tract of land, known as the "mill tract," containing about 20 acres. It appears that a portion of this mill tract, amount not shown by the record, was conveyed to the appellant company prior to March 23, 1908, and that by deed bearing the last-named date the balance of the tract was conveyed to that company. This last-named deed had not been recorded on the 15th day of April, 1908, when the gen-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

eral assignment, which embraced the land in controversy, was made and recorded.

The circuit court held that the disputed land, known as the balance of the mill tract, passed under the trust deed to the appellees, and that the Scott Roller Mill Company acquired no title thereto under its deed of March 23, 1908, because of its failure to record such deed. From that decree this appeal was taken.

It appears that by decree of July, 1908, the cause was referred to a commissioner to report the assets of Winfield Scott conveyed in the deed of trust of April 15, 1908, and his liabilities. The commissioner filed his report the following October, reporting a debt, including interest, of \$1,930.14 in favor of the appellant company. This finding was excepted to by the debtor, Winfield Scott, and thereupon the cause was recommitted to the commissioner for further inquiry with respect to the debt reported in favor of the appellant. At the following April term of the court the commissioner filed his second report, in which he reported as a liability of Winfield Scott an account filed by the appellant in the following words and figures:

W. Scott, in account with Scott Roller Mill Co., Dr.

1909.

March 25. To amount credited W. Scott, for twenty
acres and few rods of land which company
failed to get because deed was not re-
corded before deed of trust \$500.00

At the instance of the appellees, the cause was again recommitted to the commissioner, because his report was incomplete, in that it did not report all the matters of account between the Roller Mill Company and W. Scott. When the cause was pending before the commissioner under this last-mentioned order, the Scott Roller Mill Company, for the first time, brought before the commissioner its unrecorded deed of March 23, 1908, from W. Scott, claiming title thereunder to the land in controversy. In support of this claim appellant sought to show that the deed from Scott had been delivered to it at a meeting of the company's stockholders in the presence of G. W. Agnew and F. J. Agnew, two of the trustees in deed of assignment, and that the trustees, at the time of the conveyance to them, knew that the 20 acres of land in controversy had been sold and conveyed to the appellant company.

The commissioner, in his third report, filed at the October term, 1909, says with respect to this new claim of the appellant that the weight of the evidence is against the contention that the deed to appellant was delivered to it before the 15th day of

April, 1908, the date of Winfield Scott's assignment. This finding of the commissioner is amply sustained by the evidence, and it is also satisfactorily shown that the trustees had no knowledge of the deed from Winfield Scott to the appellant company until after the property had been conveyed to them for the benefit of Scott's creditors.

Appellant further insists that the deed from Winfield Scott to the trustees did not convey the 20 acres of land in controversy, and in support of this position it relies upon the following language of the assignment describing the property: "One piece bought of M. Scott, executor, balance of the mill tract after deducting the amount conveyed to the Scott Roller Mill Company, lying about three miles northeast of Floyd Court House," etc.

This description of the property as the "balance of the mill tract after deducting the amount conveyed to the Scott Roller Mill Company," is in effect the same description used by the same grantor in the deed under which the appellant claims. In both deeds the land is described as the balance of the tract; the grantor having in mind, no doubt, the fact that part of the mill tract had been conveyed to the Scott Roller Mill Company some time before this controversy. There can be no question of the identity of the land conveyed by the two deeds. That they both convey the same land is shown by the undisputed evidence of Winfield Scott, the grantor in both deeds, who says: "The description of the land in the assignment fits the same land conveyed in the deed to the Scott Roller Mill Company."

Together with a large number of other creditors of Winfield Scott, the appellant company was made a party defendant to this suit. It did not, however, which would have been the proper practice, file an answer to be treated as a cross-bill, setting up its deed of March 23, 1908, and claiming title to the property. On the contrary, appellant filed an account before the commissioner, to be audited as a liability of Winfield Scott, for \$500, distinctly stating on the face of the account that it was the consideration for the deed of March 23, 1908, which it had credited to W. Scott, and was entitled to recover back because it had failed to get the land by not recording its deed before the deed of trust was recorded. This was a clear disclaimer by the appellant of any ownership of the land under the deed of March, 1908, and an assertion of its right to reimbursement of the purchase price which was allowed by the commissioner. Not until some time thereafter, when the commissioner was making his third and last report involving a settlement of the accounts between W. Scott and the appellant, did the latter bring forward

this deed of March 23, 1908, and claim to be, by virtue thereof, the owner of the land in controversy.

As already seen, there were no pleadings putting in issue the present belated contention of the appellant, and, without intending to approve as proper practice the method adopted for raising the question, it is sufficient to say that upon the whole case the appellant has failed to sustain the issue raised by its assertion of title to the land in controversy, and the decree appealed from must be affirmed.

Affirmed.

VIRGINIA RY. CO. *v.* HURT *et al.*

SAME *v.* LINKOUS *et al.*

Sept. 14, 1911.

[72 S. E. 110.]

1. Damages (§ 112*)—Fires—Measure of Damages.—Where part of the owners of timber negligently fired by a railroad company were infants and incapable of selling their interest without the aid of a court of equity, the deterioration in timber after the injury up to the time the court of equity could act was a proper item of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

2. Railroads (§ 485*)—Fires—Instructions—Applicability to Evidence.—In an action for the burning of timber, there was evidence that, if the timber could be got off the land in a few months after the fire, the damage would be very little, but that, if it remained several years, it would be practically worthless. Some of the owners of the land were infants, who could not dispose of their timber without the aid of a court of equity. There was no evidence showing when a disposition of the timber could be made by the court. Held, that an instruction allowing the jury to consider the deterioration, if any, during a reasonable time for marketing the timber after the fire, was not applicable to the evidence, and was misleading.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 485.*]

3. Damages (§ 174*)—Fires—Evidence—Admissibility of Evidence.—In an action against a railroad for an injury to timber by fire, where there was evidence that, if the timber was taken off the land within a few months after the fire, the damage to it would have been very little, but that, if it was taken off with a small force, it would be damaged 50 per cent. or more, evidence of plaintiff that situated as he was it would take him from three to four years to

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